United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

with affidavit

74-2107

To be argued by
STEVEN J. GLASSMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2107

GEORGE RIOS, et al.,
Plaintiffs-Appellees,

—*and*—

JOHN GUNTHER, et al.,
Applicants to Intervene-Appellants,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638, et al.,
Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—*and*—

JOHN GUNTHER, et al.,
Applicants to Intervene-Appellants,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638, et al.,
Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638, et al.,
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BRIEF OF PLAINTIFF-APPELLEE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Statement of the Case

These actions were brought in 1971 by the Government and private plaintiffs to remedy a pattern and practice of discrimination by defendants against non-whites in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.* After lengthy proceedings and a full trial on the merits, the District Court on June 21, 1973 ordered an end to various racially discriminatory practices which were found to exist, *United States* v. *Enterprise Association Steamfitters, Local 638,* 360 F. Supp. 979 (S.D.N.Y. 1973), *aff'd sub nom, Rios* v. *Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974). The District Court, in furtherance of an overall goal of 30% minority representation,* ordered an initial period of exclusively non-white admissions to the union, followed by non-discriminatory admissions as finally embodied in an affirmative action program adopted by Order dated March 29, 1974.

By notice of motion dated March 28, 1974, appellants John Gunther, et al., applied for an order granting leave to intervene as of right under Rule 24(a)(2), Fed. R. Civ. Proc., to enforce certain alleged rights which they claim were newly created by the judgment entered below. On July 9, 1974, Judge Dudley B. Bonsal denied intervention on the grounds that the motion was untimely, the proposed intervenors failed to state a claim under Title VII, and that alternate statutory remedies would have to be invoked to cure the alleged grievances. Applicants to intervene-appellants John Gunther, et. al., ("applicants") have appealed from the order denying post-judgment intervention.

* The precise goal is still the subject of proceedings in the District Court pursuant to a limited remand by the Court of Appeals, but is not at issue in this appeal.

Issues Presented

1. Did the District Court properly deny post-judgment intervention of right in a Title VII action where the proposed intervenors presented no claims under Title VII, did not challenge the relief granted, and claimed rights which could be vindicated in another action?

2. Was the application to intervene untimely where the only claims which arguably could have justified intervention should have been raised in the original District Court proceedings?

Facts

A. The District Court's Orders to End Discriminatory Practices

Following lengthy trial of these combined actions on behalf of black and Spanish-surnamed ("non-white") individuals, the District Court on June 21, 1973 made findings of a pattern and practice of racial discrimination by defendant Local 638 in admissions to the union, work referral and apprentice training (A. 52a-57a).* The District Court simultaneously entered an Order and Judgment divided into several parts: equitable relief enjoining discrimination on the basis of race, color, or national origin (A. 59a); appointment of an Administrator to implement the decree and supervise its performance (A. 59a); preparation of an affirmative action program designed to achieve a goal of 39% non-white membership in the A Branch of Local 638 by July 1, 1977 (A. 60a); and Transitory Provisions, applicable until the adoption of an affirmative action plan (A. 61a-62a). These transitory provisions provided for an initial period of three months during which only qualified non-whites could and would be admitted to

* "A. ..." refers to pages in the Joint Appendix.

the union (A. 61a). This initial period was subsequently extended by the Court to December 31, 1973 (A. 38a). The decree further provided that, following expiration of this initial period until the effective date of the affirmative action program, admissions would be on a one-for-one, white for non-white basis, subject to changes in the interim procedures as might be considered by the Administrator and approved by the Court (A. 61a). The Court's efforts, as expressed at conferences with the parties, were intended to remedy discrimination against non-whites, even though provisions under which whites could be admitted were also included (A. 173a-175a). An affirmative action plan, adopted on March 29, 1974 (A. 40a-45a; 64a-72a), provided for minimum annual goals to reach the ultimate 30% non-white goal (A. 65a). The goals were to be met through a combination of apprentice training, direct admissions, and programs for other trainees, with the methods of entrance into the union being subject to continuing review by the Administrator (A. 67a). Direct admissions of journeymen was to be on a non-discriminatory basis, but "for the purpose of achieving the goals" (A. 40a). While the decree was not designed to preclude the admission of a reasonable number of skilled whites, limits and temporary ratios resulting from an excess of applicants in relation to available work were contemplated in the decree, with the approval of the Administrator (A. 44a-45a).

B. The Nature of the Applicants to Intervene and Their Proposed Complaint

All the applicants are white (A. 4a, 11a). They are members of the B Branch of Local 638 who claim that the union has failed to transfer them to the A Branch, although they are qualified for such transfer (A. 4a, 7a-9a). They do not oppose the District Court's efforts to

end racial discrimination, but rather claim to be victims of the same practices that resulted in exclusion of non-whites from the A Branch of the Union (A. 30a).*

Their proposed complaint (A. 15a-21a) states that the underlying actions are brought under Title VII of the Civil Rights Act of 1964 (A. 15a). Although applicants make no claims directly under Title VII, they claim that their complaint is ancillary to the two main actions, and that there is independent jurisdiction under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (A. 15a).

Applicants seek enforcement of alleged new rights for whites which they claim were created by the District Court's orders (A. 16a, 18a). Their applications for membership in the A Branch of Local 638 have apparently not been considered or processed to completion (A. 9a-10a), although the applications of some whites have been processed (A. 131a, 134a, 149a).

Unfair labor practices are alleged in affidavits (A. 29a), and in the proposed complaint (A. 19a), and charges have been filed with the National Labor Relations Board (A. 145a, 159a-160a).

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* There was neither testimony below, nor findings of the District Court to support this contention. Compare *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity*, —— F. Supp. ——, 8 E.P.D. ¶ 9736 (S.D.N.Y. 1974), *appeal pending*, No. 74-2548 (2d Cir.).

ARGUMENT

POINT I

The District Court properly denied post-judgment intervention of right in a Title VII action where the proposed intervenors presented no claims under Title VII, did not challenge the relief granted and claimed rights which could be vindicated in another action.

The District Court, in denying the motion for leave to intervene (A. 3a-5a), based its conclusion on several factors, including untimeliness, failure to raise issues under Title VII, and the existence of other remedies for alleged violations of the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, or the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531.

In the instant case, applicants readily admit, as the District Court found, that they have no claim under Title VII and do not challenge the relief granted. As such, their attempt to intervene must fail.

Pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, intervention of right is permitted upon timely application:

> When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In order to merit intervention of right, one must have a "significantly protectable interest." *Donaldson* v. *United States,* 400 U.S. 517, 531 (1971); See *Diaz* v. *Southern Drilling Corp.,* 427 F.2d 1118, 1124 (5th Cir.), *cert. denied,* 400 U.S. 878 (1970); *rhrg denied,* 400 U.S. 1025 (1971); *United States* v. *936.71 Acres of Land, More or Less, In Brevard Co., Florida,* 418 F.2d 551, 556 (5th Cir. 1969); *United States* v. *Atlantic Richfield Co.,* 50 F.R.D. 369 (S.D.N.Y. 1970), *aff'd, sub nom., Bartlett* v. *United States,* 401 U.S. 986 (1971); *Hobson* v. *Hansen,* 44 F.R.D. 18, 23-24 (D.D.C. 1968).

Applicants rely on alleged new rights which they claim were created by the District Court for white steamfitters who were not parties to the action. Such reliance is directly in conflict with the substance and intent of the decree and affirmative action program, whose purpose was to remedy the effects of past racial discrimination. No such rights were created or recognized.

In framing the original decree, at a conference on April 26, 1973, Judge Bonsal stated:

> What I have been thinking of, I was thinking the same kind of people we had at the time of the preliminary injunction and that is what was hitting me here and it was an attempt to correct the errors of the past. Listening to you gentlemen talk, I think I find that you all really agree that these transitory admissions shouldn't be limited to minorities as I had originally drawn it here.
>
> What would you think of something like this, providing a period of time and I don't know what that period of time would be, to have the program in two phases. The first phase to admit the people like the 169,* and that would encompass a certain

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* 169 non-whites were admitted pursuant to a preliminary injunction granted in 1971.

period of time, I don't know what, 60 days or something like that.

And then after that, a second phase where either whites or non-whites who complied with these requirements could be admitted" (A. 173a-174a).

The Court later continued:

". . . from the employer's point of view there are not enough steamfitters around. I think that is what he said. But I do agree that our efforts here are predicated on the minority representation and the minority jobs. I don't think I have an issue in this case at the present time that there shall be X thousand steamfitters in the City of New York. I don't think that is in this case. It is a matter of collective bargaining to a certain extent, but the issue I have is to see that the - - that people who are classified and who have the experience and who are minority people have an opportunity to be steamfitters . . ." (A. 175a).

All of the substantive provisions of the affirmative action plan, which replaced the prior transitory provisions, were designed to achieve the non-white membership goals ordered by the Court (A. 65a). Thus, the plan ordered by the Court provided in paragraph 15 thereof:

"All admissions into the Union shall be on the same basis, regardless of race, color or national origin, and the procedures hereinafter set forth in this Section B [Direct Admission to the A Branch] are for the purpose of achieving the goals herein before set forth . . ." (A. 40a).

In its decision denying post-judgment intervention, the Court reaffirmed the purpose of the decrees it had issued in the following terms:

"These consolidated actions were brought under Title VII of the Civil Rights Act of 1964. The purpose of the Court's Order of June 21, 1973 and of the Affirmative Action Plan was to correct past discrimination in the steamfitting industry with respect to non-whites and to establish procedures to prevent such discrimination in the future" (A. 3a).

It is thus clear that there was no new right for whites created or intended by the District Court which would justify the proposed intervention. See *Donaldson* v. *United States, supra,* and other cases cited at p. 7, *supra.*

In addition to the expressed intent of the District Court, the effect of the proposed intervention should be noted. Although applicants now claim to seek merely the enforcement of some newly created "right", their proposed complaint also alleges jurisdiction under Section 102 of the Labor-management Reporting and Disclosure Act of 1959 (A. 15a) and unfair labor practices are specifically alleged (A. 19a, 29a). The relief sought by applicants is the immediate admission to the union of whites whose applications have not been processed (A. 20a-21a).

The record reveals that the applications of some whites are being processed (A. 131a, 134a, 149a). If some whites are not being admitted as quickly as they would like, the effect of course is to hasten the achievement of the non-white union membership goal set by the Court. Since the purpose of such a goal is to rectify the damage inflicted by past racial discrimination, and place non-whites in the same position they would have been absent such discrimination, *Rios* v. *Enterprise Association Steamfitters Local 638, supra,* 501 F.2d at 629-632; *see Associated General Contractors* v. *Altshuler,* 490 F.2d 9, 16-19 (1st Cir. 1973), *cert. denied,* 42 USLW 3594 (1974), the District Court could have ordered even more expeditious membership for qualified non-whites. The admission of these white ap-

plicants through intervention would slow down the current progress towards reaching the non-white goal.

To hold that a decree remedying past racial discrimination and providing for equal employment opportunity creates new substantive rights for whites who had not been parties to the litigation, the exercise of which would reduce the speed of achievement of Title VII relief, has no legal support and is contradicted by the express intent of the District Court. Moreover, absent racial, sex or religious discrimination against these applicants, they do not have any substantive rights under Title VII, and it is doubtful that ancillary benefits justifying intervention of right here could be created. *See United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 665 (2d Cir. 1971).*

Limited forms of permissive intervention by whites in Title VII cases prior to the granting of relief have been permitted, but only as defendants for purposes of contest-

* An amendment to Title VII, proposed by Rep. Cahill of New Jersey, which was rejected, attempted to make it an unlawful employment practice to exclude persons from union membership on any basis. In offering the amendment, Rep Cahill said:

> "The purpose of my amendment is to permit any qualified person to become a member of a union and not to limit the authority of the Commission (EEOC) to cases of disqualification on the basis of race, color, creed or national origin." 110 Cong. Rec. 2593.

In urging rejection, Rep. Roosevelt of California said:

> ". . . This bill is limited to discrimination on account of race, color or creed. The gentleman from New Jersey may have a very laudable idea in his mind, and certainly, perhaps, one that should be given consideration, but it has nothing to do with this bill. I earnestly ask my colleagues on the committee not to bring into the bill subject matter which has really nothing to do with this bill at all." 110 Cong. Rec. 2594.

ing relief and its supposed adverse effect on other whites in the industry. See *Patterson* v. *Newspaper and Mail Deliverers Union of New York and Vicinity, supra; Chance* v. *Board of Examiners,* — F. Supp. —, 7 EPD ¶ 9084 at 6576 (S.D.N.Y. 1973). See also *Chance* v. *Board of Examiners,* 51 F.R.D. 156 (S.D.N.Y. 1970). Applicants here do not claim even the type of interest which resulted in the limited permissive pre-judgment intervention in those cases. Even *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), relied on by applicants, involved intervention for the purpose of contesting the framing of relief and protection of an earlier Supreme Court mandate. *Id.* at 135-36.

Simply stated, there is here no "interest relating to the property or subject of the action" which would merit intervention.

Further, under Rule 24(a)(2), the disposition of this action will not "as a practical matter impair of impede [appellan's'] ability to protect" any interest they may have. They do not allege reverse discrimination. Insofar as they may have any claim of an unfair labor practice, they have already filed claims with the National Labor Relations Board and may thus protect such an independent interest, if any, which may exist. See *San Diego Building & Trades Council, Millmen's Union, Local 2020* v. *Garmon,* 359 U.S. 236, 245 (1959); *Abrams* v. *Carrier Corp.,* 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971).

In Title VII cases it has been held that even minorities seeking to intervene as plaintiffs will not be allowed to do so where they raise separate claims from those raised in the same action. See *Doctor* v. *Seaboard Coast Line Railway Co.,* — F. Supp—, 7 EPD ¶ 9172 (M D N C 1974); and — F. Supp. —, 6 EPD ¶ 8877 (M D N C 1973); *Newmon* v. *Delta Air Lines, Inc.,* 374 F. Supp. 238, 243 (N.D. Ga. 1973). *See also, Bennett* v. *Madison County Board of Edu-*

cation, 437 F.2d 554 (5th Cir. 1970); *Horton* v. *Lawrence County Board of Education,* 425 F.2d 735 (5th Cir. 1970).

Where applicants' rights can be vindicated in another action, this factor alone requires denial of an application for intervention of right under Rule 24(a)(2). *SEC* v. *Everest Mgt. Corp.,* 475 F.2d 1236, 1239 (2d Cir. 1972); *Ionian Shipping Co.* v. *British Law Ins. Co.,* 426 F.2d 186, 189 (2d Cir. 1970); *United States* v. *Atlantic Richfield Co., supra; Hobson* v. *Hansen, supra,* 44 FRD at 26.

Post-judgment intervention of right was properly denied in this case, where there are no claims presented under Title VII, the relief granted below is not challenged, and appellants' rights, if any, can be vindicated in another action.

POINT II

The application to intervene was untimely where the only claims which arguably could have justified intervention should have been raised in the original District Court proceedings.

The courts are extremely reluctant to allow post-judgment intervention, and will require a strong showing or extraordinary circumstances to justify such action. *See Harper* v. *Kloster,* 486 F.2d 1134, 1137 (4th Cir. 1973); *McDonald* v. *E.J. Lavino, Co.,* 430 F.2d 1065, 1071-2 (5th Cir. 1970); *United States* v. *Carroll County Bd. of Education,* 427 F.2d 141 (5th Cir. 1970); *NLRB* v. *Shurtenda Steaks, Inc.,* 424 F.2d 192, 194 (10th Cir. 1970); *United States* v. *Blue Chip Stamp Co.,* 272 F. Supp. 432, 435-38 (C.D. Cal. 1967), *aff'd,* 389 U.S. 580 (1968).

The standard of review of the District Court's determination is abuse of discretion. *NAACP* v. *New York,* 413 U.S. 345, 366 (1973); *Iowa State Univ. Research Foundation, Inc.* v. *Honeywell, Inc.,* 459 F.2d 447, 449 (8th Cir. 1972); *McDonald* v. *E.J. Lavino Co., supra,* 430 F.2d at 1071; *Lumberman's Mutual Casualty Co.* v. *Rhodes,* 403 F.2d 2[illegible] (10th Cir.), *cert. denied,* 394 U.S. 965 (1969).

As noted above, although appellants now claim to seek merely the enforcement of an alleged new post-judgment "right", their proposed complaint states that their claim is ancillary to the main actions brought under Title VII, and further alleges independent jurisdictional claims under the Labor-Management Reporting and Disclosure Act and unfair labor practices.

The only legally sufficient basis for intenvention of right at any stage of this litigation would be a claim under Title VII, or perhaps a limited right to permissive intervention to challenge the type of relief to be granted in the Title VII case as it might affect the proposed intervenors. At this stage of the proceedings such claims would clearly be untimely. Similarly, any possible claims under the Labor Management Relations Act or the Labor-Management Reporting and Disclosure Act are not only unrelated to the underlying action and the proper subjects of separate actions by appellants, see discussion at pp. 11-12, *supra,* but clearly do not present the extraordinary circumstance that would allow post-judgment intervention in a Title VII case. Regardless, there is no new post-judgment right created for these proposed intervenors in this litigation. See discussion, Point 1, *supra.*

The relief sought by appellants is immediate admission to the union of whites whose applications have not been processed (A. 20a-21a). Whether their claim is of some Title VII right, an unfair labor practice, or is couched in terms of some new post-judgment right without any prior basis in law, the effect of allowing intervention here would be to change the nature of the relief or at least the speed of achievement of the relief granted below to remedy the

effects of racial discrimination. The effect of allowing intervention would thus be similar to that of allowing intervention for purposes of contesting the nature or speed of relief at the pre-judgment stage. See *Patterson* v. *Newspaper and Mail Deliverers' Union, supra,* and discussion at pp. 9-11, *supra.* Applicants were aware of the litigation since its inception, and their complaints are longstanding ones. See Brief of Appellants, pp. 4-5. To allow such a claim now would be to undermine the basic policy of requiring timely intervention to present legitimate claims of relief, if any. Compare *Hodgson* v. *United Mine Workers,* 473 F.2d 118, 129 (D.C. Cir. 1972), cited by appellants, in which post-judgment intervention was timely where substantial problems of relief remained to be resolved. The real interests, if any, of appellants (in the nature or speed of relief, or in alleged unfair labor practices growing out of the same union conduct which resulted in racial discrimination) could have presented at a much earlier stage of the proceedings. Intervention which effectively asserts such interests now is clearly untimely. *See Diaz* v. *Southern Drilling Corp., supra,* 427 F.2d at 1125; *NLRB* v. *Shurtenda Steaks, supra,* 424 F.2d at 194; *SEC* v. *Bloomberg,* 299 F.2d 315, 326 (1st Cir. 1962).

Further, where intervention at a late stage of the proceedings would result in prejudice to existing parties, as would be the case here if the nature or speed of elimination of the vestiges of past discrimination were to be affected, see discussion at pp. 9-10, *supra,* that alone would justify denial of intervention as untimely. *McDonald* v. *E.J. Lavino Co., supra,* 430 F.2d at 1073; *Diaz* v. *Southern Drilling Corp., supra,* 427 F.2d at 1125-26.

Where as here the only claims which arguably could have justified intervention should have been raised in the original District Court proceedings, and where other parties may now be prejudiced by intervention, the application to intervene was properly denied as untimely.

CONCLUSION

For all the above reasons, the Order of the District Court denying intervention should be affirmed.

Respectfully submitted,

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January, 1975.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 27th day of January 1975 s he served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

1) Dennis R. Yeager, Esq., National Employment Law Project Inc. 423 West 118th St. NY NY 10027
2) Thomas A. Shaw, Jr., Messrs. Breed, Abbott & Morgan, 1 Chase Manhattan plaza, NY NY 10005
3) Richard Brook, Esq., Messr. Delson & Gordon, 230 Park Ave. NY NY 10017
4) Burton H. Hall, Esq., 401 Bway NY NY 10013

And deponent further says s he sealed the said envelope s and placed the same in the mail chute drop for mailing in the United Stat[illegible] Courthouse, Foley Square, Borough of M[illegible]k.

Pauline Troia

Sworn to before me this
27 day of January 19[illegible]

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975